In the Supreme Court of the United States.

OCTOBER TERM, 1908.

JULIAN E. WOODWELL, APPELLANT,
v.
THE UNITED STATES.
No. 143.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This action was brought in the Court of Claims to recover for services alleged to have been rendered in the installation of the electric-light plant in the buildings occupied by and under the control of the Department of the Interior, Washington, D. C.

During the period covered by these services appellant was an employee in the Treasury Department, as inspector of electric-light plants under the jurisdiction of said department, and received a salary of $2,000 per annum.

The sundry civil appropriation act for the fiscal year ending June 30, 1902 (31 Stat., 1156), provided for the installment of an electric-light plant and for improvement of the heating system of buildings occupied by the Interior Department, and appropri-

ated $74,000 for that purpose, making no special provision for the employment of or payment for the services of an engineer, architect, or inspector (Rec., p. 9,. It appears in the correspondence between the Secretary of the Interior and the Secretary of the Treasury (Rec., pp. 5, 6, 7, 8) that there was no one regularly employed in the Interior Department qualified to prepare the plans and superintend the work, and that appellant, being familiar with such duties, was directed by the Secretary of the Treasury on May 10, 1901, to confer with the chief clerk of the Interior Department relative to the installation of the plant (Rec., p. 6). On June 21, 1901, the appellant was designated by the Secretary of the Interior as a member of a board of three, one from the Interior Department, one from the Post-Office Department, and the appellant from the Treasury Department, to open bids and recommend awards of contracts for this work (Rec., p. 7). Appellant was also directed, after special authority was secured from the Secretary of the Treasury, to go to Ridgeway, Pa., to inspect material to be used in the work. On this trip appellant expended $110. The record does not show whether or not he was reimbursed therefor.[a]

While stating in the opinion (Rec., p. 9) that the language of the directions under which appellant worked was indefinite as to the nature of his duties, the court found that as the result of the correspondence mentioned appellant performed certain services in and about the installation of said plant from

[a] Counsel will doubtless agree that appellant was reimbursed.

May 10, 1901, to February 1, 1902, the time consumed being eight hundred and ninety-seven hours, and that the work was done either during his annual vacation or outside of the regular office hours fixed for his duties in the Treasury Department. Appellant claimed that his services were worth 5 per cent of the total expenditure of $73,500, or $3,675; but there is no finding on this subject. There is nothing in the record, other than the statement in the petition, indicating the basis of this charge and nothing to show what such services were worth.

The court below rendered an opinion and entered judgment dismissing appellant's petition, whereupon he appealed to this court, and makes the following assignment of errors:

> The Court of Claims was in error—
>
> 1. In holding that because the claimant was an employee of the Government he could not recover the value of services performed for the Government entirely distinct from, and independent of, those required of him by virtue of his office.
>
> 2. In holding this to be a claim for additional or extra compensation, and that it is subject to the provisions of sections 1763, 1764, and 1765 of the Revised Statutes.
>
> 3. In holding that the claimant did not hold two distinct offices or places, each of which had its own duties and compensation.
>
> 4. In holding that an explicit provision for payment for such services in the appropriation bill was necessary to create liability for claimant's services on the part of the United States.

5. In not awarding a judgment in appellant's favor for $3,675.

THE STATUTES.

The law bearing upon the issues may be found in the following statutes:

> No officer in any branch of the public service, or any other person whose salary, pay, or emoluments are fixed by law or regulations, shall receive any additional pay, extra allowance, or compensation, in any form whatever, for the disbursement of public money, or for any other service or duty whatever, unless the same is authorized by law, and the appropriation therefor explicitly states that it is for such additional pay, extra allowance, or compensation. (R. S., sec. 1765.)
>
> No person who holds an office, the salary or annual compensation attached to which amounts to the sum of two thousand five hundred dollars, shall receive compensation for discharging the duties of any other office, unless expressly authorized by law. (R. S., sec. 1763.)

Section 1764, Revised Statutes, provides as follows:

> No allowance or compensation shall be made to any officer or clerk, by reason of the discharge of duties which belong to any other officer or clerk, in the same or any other department; and no allowance or compensation shall be made for any extra services whatever, which any officer or clerk may be required to perform, unless expressly authorized by law.

The only authority of law for expenditures in the work upon which appellant was engaged is in the sundry civil appropriation act of June 30, 1902 (31 Stat., 1156), providing:

> Electric-light plant for the Department of Interior buildings: For the establishment of an electric-lighting plant for buildings occupied by offices of Department of the Interior, the Patent Office building, the old Post-Office building, now occupied by the General Land and Indian bureaus, and the Pension Office building, and for improvement in the heating of the Patent Office buildings, including necessary conduits, the laying and construction of which are hereby authorized, seventy-four thousand dollars.

THE ISSUES.

Appellant contends that section 1765 does not apply because this service was separate and distinct from any service that could be required of him under his appointment in the Treasury Department; that it was performed on his own time; that the claim is not one for "additional" or "extra" compensation, but is for "compensation for services having no affinity or connection with the duties of the office held by appellant." (Brief, pp. 10, 11.)

The Government contends that said section 1765 applies with full force and effect in this case and that there is no exception in favor of appellant carved out of said section either explicitly or by inference, and, therefore, that unless specially authorized by law no "additional pay, extra allowance, or compensation in

any form whatever" can be allowed to appellant for his services in connection with the installation of said electric-light plant.

ARGUMENT.

In order to entitle appellant to a judgment in this case there must be some provision of law authorizing his employment and compensation therefor, or some statute authorizing his employment under a contract or regulation fixing his compensation. The act providing for the construction of the electric-light plant is entirely silent as to any provision for any sort of office, place, additional or separate services in connection with that work. There was no office or position fixed to which the appellant was or could be appointed directly or assigned temporarily. The services he performed were just such services for which payment is prohibited.

In referring to the foregoing statutes the court below gave an historical relation of the development of these prohibitive provisions and as leading up to the particular section applicable to this claim, namely, section 1765. The appellant here held one office fixed by law with a statutory rate of pay. There was no other office created either by law or executive regulations in which his services could be legally required. As to money payments, section 1765 uses the words "additional pay," "extra allowance," "*or compensation in any form whatever.*" As to services it employs these words: "For the dis-

bursement of public money *or for any other service or duty whatever.*"

There is no room for differences as to the meaning of these terms. It is apparently clear that Congress intends to control absolutely the compensation to be allowed to the officers and employees of the Government, and that, unless authorized by law, no additional pay, extra allowance, or compensation in any form whatever shall be allowed to any officer in the public service for any other service or duty.

The court below did not hold that under all circumstances the value of services performed separate and apart from the duties of a fixed office could not be recovered. It may not be denied that if such services and compensation therefor are provided by law, or fixed by a contract authorized by law, and the additional duties or office are compatible with those incident to the regular appointment, payment for such services may be recovered. But in the case at bar there existed no such authority of law, and this is the basis of the judgment of the Court of Claims in dismissing the appellant's petition.

The plain purpose of Congress may be seen in the progressive history of all legislation on this subject, beginning with the act of 1822 (3 Stat., 696) and ending with the act of June 30, 1874, providing—

> That no civil officer of the Government shall hereafter receive any compensation or perquisites, directly or indirectly, from the Treasury or property of the United States beyond his salary or compensation allowed by law.

This court, after reviewing these acts, used the following language:

> The just and fair inference from these acts of Congress, taken together, is that no discretion is left to the head of a department to allow an officer who has a fixed compensation any credit beyond his salary, unless the service he has performed is required by existing laws and the remuneration for them is fixed by law. (*Converse* v. *The United States*, 21 How., 473.)

No departure from these views has ever been noted in subsequent decisions of this court. Judgments have been affirmed in favor of claimants who have held two distinct offices, or who, holding one distinct office, have performed other separate duties under a separate employment, but in each case the court finds some provision of law authorizing the employment and providing for the compensation.

In the case of *United States* v. *Shoemaker* the question was whether there was any law affording compensation for the services of the regular collector of the port at Detroit in disbursing money appropriated for buildings. The court held there was no such authority and that the appellee could not recover on a *quantum meruit*. After discussing the act of 1842 (R. S., 1765), the court reaffirms the rule in the *Converse case, supra*, and in reference thereto says:

> In that case a compensation was allowed for an extra service rendered by the collector, but it was allowed for the reason that the service was rendered in pursuance of existing

> laws, and the appropriation for a compensation was made by law. The principle settled in that case is decisive against the allowance in the present one. (7 Wall., 342.)

The same rule was announced in the case of *Stansbury* v. *United States*, as follows:

> The appellant insists that the written promise of the Secretary to pay him the value of his services is a binding obligation on the Government. But this is not so, for no authority of law existed for the promise. The Secretary could not pay the claim because there was no appropriation to pay it, and he was not authorized by Congress to create an agency to perform the service in question. He undoubtedly acted in good faith with Stansbury, and supposed that Congress would approve the mode he adopted for obtaining useful information, and ratify his proceedings; and his promise, under the circumstances, must be considered as a dependent one, to take effect if Congress appropriated money to enable him to comply with it. Congress having failed to make the appropriation, the Secretary was justified in refusing to pay the claim. (8 Wall., 36.)

Again, in the *Hall case*, where these acts of Congress are reviewed, it was said:

> Compensation for extra services, where no certain sum is fixed by law, can not be allowed by the head of a department to any officer who has by law a fixed or certain compensation for his service in the office he holds, unless such head of a department is thereto author-

ized by an act of Congress. (*Hall et al.* v. *United States*, 91 U. S., 564.)

The case of *Saunders* v. *United States* was decided upon the point that the claimant held *two distinct offices*, "*with salaries or compensation affixed to each by law or regulation.*" (120 U. S., 129.)

The rule in the *Converse case, supra*, was again invoked in the case of *United States* v. *Brindle*, which was decided in favor of the claimant expressly on the ground that "by express provisions in the treaties the expenses incurred by the United States in making the sales were to be paid from the proceeds," and that "this clearly implied the payment of a reasonable compensation for the services of those employed to carry the trust into effect." Moreover, this case turned on the act of August 31, 1852 (10 Stat., 100), now section 1763, Revised Statutes, as follows:

> No person who holds an office the salary or annual compensation attached to which amounts to the sum of two thousand five hundred dollars shall receive compensation for discharging the duties of any other office, unless expressly authorized by law.

The provisions of section 1765, Revised Statutes, invoked in the case at bar, do not appear to have been considered in the Brindle case except in so far as the rule in the Converse case is approved.

It was claimed in the case of *Mullett* v. *United States* that the claimant while holding the office of Supervising Architect of the Treasury Department rendered services in preparation of plans for a special commission not connected with the general scope of

his duties in the Treasury Department, and that such services were rendered on an implied promise to pay. This court considered the case under sections 1763, 1764, and 1765, Revised Statutes, and, after reviewing the foregoing decisions, the judgment of the lower court adverse to claimant was affirmed on the ground that there was no promise to pay and no act of Congress authorized the employment or provided for any compensation. With reference to these laws prohibiting such payments the court again says:

> Obviously, the purpose of Congress, as disclosed by these sections, was that every officer or regular employee of the Government should be limited in his compensation to such salary or fees as were by law specifically attached to his office or employment. "Extras," which are such a fruitful subject of disputes in private contracts, were to be eliminated from the public service. Such purpose forbids a recovery in this case. Mr. Mullett as Supervising Architect of the Treasury was in the regular employ of the Government at a stated salary of five thousand dollars. He was employed to render services which, if not strictly appertaining to his office or position, were of the same general character and to be performed at the same plac. No new office was created; no express promise of payment was made; no act of Congress in terms gave authority to promise payment, or made any provision or appropriation for compensation. The case is one simply of a claim for compensation for extra services, when not express authority

> therefor can be found in any act of Congress. (150 U. S., 570.)

In the case of *Hoyt* v. *The United States*, after quoting the eighth section of the act of March 3, 1839 (5 Stat. L., 349), Mr. Justice Nelson, in speaking for the court, said:

> It is impossible to misunderstand this language or the purpose and intent of the enactment. It cuts up by the roots these claims by public officers for extra compensation on the ground of extra services. There is no discretion left in any officer or tribunal to make the allowance unless it is authorized by some law of Congress. The prohibition is general and applies to all public officers or quasi public officers who have a fixed compensation. (10 Howard, 141.)

In another case a distinction was drawn between the added duties in line with the claimant's usual employment and performed in the same place, and added duties necessarily performed at a distance and of a nature different from those for which he was regularly appointed and employed. (*King* v. *United States*, 147 U. S., 676.)

DECISIONS OF THE COURT OF CLAIMS.

An analysis of the decisions cited by learned counsel for appellant discloses material differences between those cases and the case at bar as to the facts and application of the principles of law announced by this court in various cases.

In the *Crosthwaite case* (30 C. Cls., 300) (p. 13, appellant's brief) the claimant held, by regular

appointment authorized by law, the position of examiner in the Department of Justice. He was given an appointment in writing by the Attorney-General to the position of special assistant United States attorney for the purpose of presenting a case to the grand jury in Idaho. This second appointment and compensation therefor was specially authorized by law (secs. 363, 366, R. S.). The distinction between that case and the case now on appeal to this court is at once apparent. There the claimant held two positions, the appointment and compensation of each being authorized by law. The duties of each position were compatible one with the other, and the Court of Claims held that under the authority of the Saunders case the claimant could receive compensation for both. In the case at bar the appellant was never appointed to any position and no law authorized any position other than that held by him in the Treasury Department, nor was there any authority provided by law for his employment elsewhere or for his compensation either for separate service or for additional service.

As for the *Collier case* (22 C. Cls., 125), cited and commented upon at length by learned counsel for appellant, it may be said that the facts reported in the statement are somewhat similar to the facts in the case at bar, but they are by no means what counsel for appellant claims for them. Collier held the position of chemist of the Department of Agriculture and was specially employed as an expert witness in the Circuit Court of the United States for the Southern Dis-

trict of New York in a large number of cases brought against the collector of customs of New York for refundment of duties on imported sugars. It was lawful for the Secretary of the Treasury to pay for such services out of the permanent appropriation for the collection of the revenue. The claimant in accepting employment by the Treasury Department as an expert stipulated through the commissioner that no service should be required of him that would interfere in the least with his duties as chemist in the Department of Agriculture; that his work should be done outside of the hours of labor required by the department, *and that his services should be paid for by the Secretary of the Treasury at the same rate that he paid other men of like skill and experience.* This proposition was accepted by the claimant and the Treasury Department, and his employment was in accordance with its terms, specifically provided by this agreement for his compensation.

In the case at bar the appellant reported for duty to the Secretary of the Interior, in accordance with the direction by the Secretary of the Treasury, without any stipulation as to the employment of his time or compensation. The record fails to show that there was any official requirement or understanding that this appellant should perform his duties in the Interior Department under this assignment during any particular hours. The record shows affirmatively that the appellant herein on his own motion performed the service outside of the regular hours of employment in the Treasury De-

partment. This, taken in connection with the fact that appellant can show no agreement or even a suggestion of compensation for this work either from himself to the officials or from the officials of either department to appellant directly or by any order or regulation, creates a marked difference between the case at bar and the Collier case. As decisive of the Collier case the Court of Claims cited the following: *Converse* v. *United States; United States* v. *Brindle,* and *United States* v. *Saunders.*

In *United States* v. *Brindle* (110 U. S., 688), the claimant while a receiver of a local land office, was appointed by the President a "special receiver and superintendent to assist the special commissioner" to dispose of Indian lands. The law expressly provided for payment of expenses of such sale, the court holding:

> In the present case the employment was for a special service in connection with a special trust assumed by the United States for the benefit of certain Indian tribes, in which express provisions were made for the payment of expenses.

In *Converse* v. *United States* (21 Howard, 463), this court specially points out the authority for the additional employment as well as the fact that the law specifically provided for a fixed compensation, and the court said:

> no discretion is left to the head of a department to allow an officer who has a fixed compensation any credit beyond his salary unless the service he has performed is required by

> existing laws, and the remuneration for them fixed by law (p. 473).

United States v. *Saunders* (120 U. S., 126). In this case also the additional employment was in a fixed position for which the law provided certain compensation. While it may be argued that only by a questionable inference can these three cases be said to support the decision in the Collier case, the laws of analogy are certainly strained in any effort to apply the doctrines there laid down to the facts in the case at bar.

In the Stansbury case the lower court, in holding that the act of August 23, 1842 (sec. 1765, R. S.), barred the claim, said:

> It was contended for the petitioner that the services he rendered in his agency were no part of his official duty, and could not have been required of him by the head of the department as connected with or incident to his official position; and that, by the authority of the Supreme Court in *Converse* v. *The United States* (21 Howard's Reports, 463), he was entitled to compensation. But in the case cited the compensation claimed was authorized by law, and an appropriation was made for it, so that it is not an authority for the petitioner's claim. And that case was decided by a majority of the court, and the opinion of the minority sustained the ruling of the court below. We do not feel authorized, therefore, to adopt a doctrine beyond the decision made. (1 C. Cls., 124; affirmed 8 Wall., 35.)

In the Wilson case, on the same statute, there was also a distinct understanding that the claimant would be paid for his services which were entirely separate and distinct from those rendered under his regular appointment, and the court held to the same rule thus:

> The evidence indicates that the claimant's services were valuable; that they were strictly additional to the duties of his office; that they were rendered in the expectation of his being justly remunerated for them; and that the officer who employed him, and the officer under whom he acted as clerk, joined in that expectation, and gave to him such assurances; but we can not overrule the statute, and the claimant must seek relief in Congress. (1 C. Cls., 206.)

We contend that the law as announced by this court and the court below furnishes the standard whereby the facts in this case must be measured, and therefore the judgment of the lower court should be affirmed.

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